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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/818,246	03/27/2001	Kirkland W. Vogt	5216	1581

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Milliken & Company
P.O. Box 1927
Spartanburg, SC 29304

EXAMINER

COLE, ELIZABETH M

ART UNIT	PAPER NUMBER
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1771

DATE MAILED: 03/14/2003

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary

Application No.

09/818,246

Applicant(s)

VOGT, KIRKLAND W.

Examiner

Elizabeth M Cole

Art Unit

1771

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --
Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 20 December 2002.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-30 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1-30 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
- Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
- 11) ☐ The proposed drawing correction filed on _____ is: a) ☐ approved b) ☐ disapproved by the Examiner.
- If approved, corrected drawings are required in reply to this Office action.
- 12) ☐ The oath or declaration is objected to by the Examiner.

Priority under 35 U.S.C. §§ 119 and 120

- 13) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. _____.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- * See the attached detailed Office action for a list of the certified copies not received.
- 14) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. § 119(e) (to a provisional application).
- a) ☐ The translation of the foreign language provisional application has been received.
- 15) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. §§ 120 and/or 121.

Attachment(s)

- 1) ☐ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☒ Information Disclosure Statement(s) (PTO-1449) Paper No(s) 7,10.
- 4) ☐ Interview Summary (PTO-413) Paper No(s). _____.
- 5) ☐ Notice of Informal Patent Application (PTO-152)
- 6) ☐ Other: _____.

1. Claims 9-14, 16 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

In claims 9-16 the structure of the article into which the elastomer/textile composition is incorporated has not been set forth and therefore, the claims are indefinite. No structure for the "article" is recited in the claim. It is not clear whether the "article" requires additional components in addition to the elastomer/textile composition, or if the elastomer/textile composition by itself may make up the article. The scope of the claims is vague and indefinite.

2. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

3. Claims 1-30 are rejected under 35 U.S.C. 103(a) as being unpatentable over Vogt et al, U.S. Patent No. 6,040,393 in view of Spek et al, U.S. Patent No. 4,886,702. Vogt et al discloses a fabric/elastomer composite comprising a textile fabric that has been coated with an elastomer composition wherein the composition comprises a water-borne polymeric latex, an acid-generating chemical and a cloud point surfactant. The composition may be distributed throughout the fabric. See abstract. The fabric may be woven, knitted or nonwoven and may comprise the claimed fiber blends. See col. 5, lines 12-23. The fabric/elastomer composite may be made by the method of applying the elastomer composition to the textile fabric and heating the composition .

The composition may be applied by spraying, dipping and other known methods. See col. 5, lines 24-67. Vogt et al differs from the claimed invention because Vogt et al does not disclose the claimed uses of the fabric. However, a recitation of the intended use of the claimed invention must result in a structural difference between the claimed invention and the prior art in order to patentably distinguish the claimed invention from the prior art. If the prior art structure is capable of performing the intended use, then it meets the claim. In a claim drawn to a process of making, the intended use must result in a manipulative difference as compared to the prior art. See *In re Casey*, 152 USPQ 235 (CCPA 1967) and *In re Otto*, 136 USPQ 458, 459 (CCPA 1963). In this case, since the Vogt et al textile composite is capable of performing the intended uses, it meets the claim. Additionally, Vogt et al teaches incorporating the elastomer/textile composite into "articles" such as braces, sport brassieres, support apparel and the likes. See abstract. Therefore, Vogt et al meets the limitations of claims 9-14, and 16 because it teaches incorporating the elastomer/textile composite into a various articles. The recitations of what the article is used for are still recitations of intended use and are treated as such. Vogt et al also differs from the claimed invention because Vogt et al does not teach employing an acrylic latex but instead employs a polyurethane latex. Spek et al teaches that both polyurethane and acrylic latex compositions may be used as textile coating materials wherein the latex coagulates at elevated temperature. Therefore, it would have been obvious to one of ordinary skill in the art at the time the invention was made to have employed an acrylic polymer instead of a polyurethane polymer as the polymer latex in Vogt et al. One of ordinary skill in the art at the time the invention was made would have been motivated to employ an acrylic polymer instead of a polyurethane polymer because both acrylic polymers and polyurethane polymers are known to be useful as elastomeric coatings for textiles as taught by Spek et al and also because both are known to be heat

coagulable.

4. Applicant's arguments filed 12/20/02 have been fully considered but they are not persuasive.

Applicant argues that there is no motivation to employ the acrylic latex and that it would not have been obvious to have substituted the acrylic latex of Spek for the polyurethane latex in Vogt because the Vogt reference teaches the need for a uniform dispersion of the elastomer composition while Spek teaches away from a uniform dispersion.

With regard to the first argument, the teaching of Spek that both polyurethane latex and acrylic latex maybe used as elastomeric textile coatings establishes the equivalency of polyurethane latex and acrylic latex for this purpose, and therefore, it would have been obvious to have substituted the acrylic latex for the polyurethane latex. An express suggestion to substitute one equivalent component or process for another is not necessary to render such substitution obvious. In re Fout, 675 F.2d 297, 213 USPQ 532 (CCPA 1982). In this case, since Spek recognizes the equivalency of the two material, the express suggestion of the substitution is not necessary in order to render the substitution obvious.

With regard to the second argument, Vogt teaches that the printed textile should be heated to a temperature to effectuate a uniform dispersion and coagulation of the elastomer composition over the textile fabric at col. 2, lines 56-58. Applicant has not pointed out where Spek teaches that the dispersion and coagulation of the elastomer composition over the textile fabric should be nonuniform. The instant specification and the Vogt reference relied on teach that the use of secondary acid and/or salt compounds in the aqueous bath potentially creates a non-uniform coagulant on the substrate surface. However, one of ordinary skill in the art would still have been motivated to make the combination as set forth above because the only modification of

Vogt which is set forth above is to employ an acrylic latex rather than a polyurethane latex, since Spek teaches that both are useable for this purpose. The fact that the coagulation process of Spek may produce an undesirable result does not detract from the fact that Spek sets forth a list of heat coagulatable polymers which are suitable for use as elastomeric coatings for textiles, and that this list includes both polyurethane latex and acrylic latex. Spek is relied on to show that in this art, at the time the invention was made, both polyurethane and acrylic latex polymers were known to be heat coagulatable polymers which could be used to make elastomeric textile coatings. Therefore, this rejection has been maintained.

5. Applicant's amendments/arguments have overcome any grounds of rejection not maintained above.

6. **THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

7. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Elizabeth M. Cole whose telephone number is (703) 308-0037. The examiner may be reached between 6:30 AM and 5:00 PM Monday through Thursday.

Mr. Terrel Morris, the examiner's supervisor, may be reached at (703) 308-2414.

Inquiries of a general nature may be directed to the Group Receptionist whose telephone number is (703) 308-0661.

The fax number for official faxes is (703) 872-9310. The fax number for official after final faxes is (703) 872-9311. The fax number for unofficial faxes is (703) 305-5436.



Elizabeth M. Cole
Primary Examiner
Art Unit 1771

e.m.c
March 13, 2003